ANVEST CORP SDN BHD

v.

WONG SIEW CHOONG SDN BHD

COURT OF APPEAL, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-02-351-1995]
16 FEBRUARY 1998

CONTRACT: *Formation - Sale and purchase of land - Unconditional acceptance of terms and conditions - Whether there was a concluded and binding contract - Whether contract could be repudiated - Whether could be varied by introducing thereinto a new and material term*

CONTRACT: *Privity - Principals and agents - General rule - Sale and purchase of land - Sale and purchase transacted by agent - Whether there was a binding contract - Whether necessary to disclose identity of actual vendor and purchaser - Non-disclosure of principal's identity - Whether non-consequential - Whether principal entitled to benefit of contract - Contracts Act 1950, ss. 183-186*

The appellant had wanted to purchase a property in Kuala Lumpur, and on 17 August 1988 it appointed a company of valuers and estate agents ('Appraisal') to look out for such property. Appraisal in consequence approached the respondent, the proprietor of the property known as Lot 129, Section 44, Town and District of Kuala Lumpur ('the said land'). By letter dated 13 September 1988, Appraisal informed the respondent that it had found a purchaser for the said land for RM45 per square foot, to which the respondent made a counter offer of RM55 per square foot. On 3 October 1988, following the appellant's acceptance of the counter offer, Appraisal wrote to the respondent confirming that it was agreeable to purchase the said land for RM55 per square foot, on conditions, *inter alia*, that the purchase was together with vacant possession. On 4 October 1988, Appraisal again wrote to the respondent seeking confirmation of the terms of sale as stipulated in its letter of 3 October 1988, and also submitted to the respondent RM1,000 as earnest money. The respondent proposed to shorten the completion period of the sale, but otherwise gave the confirmation sought for.

On 7 October 1988, the appellant confirmed acceptance of the terms which the respondent had confirmed aforesaid. That being so, on 11 October 1988, Appraisal wrote to the respondent informing them that the purchaser had confirmed to purchase the said land on terms and conditions that the price was at RM55 per square foot, that the property was a freehold title, that the purchase was with vacant possession, that 10% of the purchase price would be paid upon the signing of the sale and purchase agreement and that the balance 90% would be paid six months after the signing of the agreement. On 14 October 1988, the respondent unconditionally accepted all these terms and conditions.

It was not in dispute that the appellant and the respondent had transacted the sale aforesaid through Appraisal, and that at all material times, the appellant's identity (as purchaser) was not known to the respondent. The facts also showed that, following the respondent's unconditional acceptance of the terms hereof, the appellant entered into a transaction with one Zodiac, wherefore it assigned to Zodiac its option to purchase the said land.

The respondent had subsequently sought to introduce a new term into the agreement, i.e. that it would sell the said land without vacant possession. Failing that, however, the respondent took steps to revoke the proposed sale, citing as grounds therefor its unwillingness to deal with an undisclosed principal. The learned judge below found that the appellant was not the purchaser of the said land as there was no privity of contract at any time between the appellant and the respondent. The appellant appealed and the principal issue that arose was whether the appellant, in law, became the purchaser of the said land on 14 October 1988 when the respondent unconditionally confirmed acceptance of the terms and conditions as set out in Appraisal's letter of 11 October 1988.

Held:
Per Mokhtar Sidin JCA

[1] It is clear that Appraisal in the letter of 11 October 1988 was contracting as an agent on behalf of its principal ie, the appellant who was unnamed then.

[2] The law relating to agents and principals and their relations to third parties is well settled and is codified under ss. 183 to 186 of the Contracts Act 1950. The general rule is that a principal is bound by, and entitled to the benefit of the contract of his agent made on his behalf within the scope of such agent's actual authority. This is so whether the agent at the time of acting named or identified his principal or merely indicated that he was acting for a principal but did not identify him.

[3] The respondent, despite knowing that the principal was unnamed, had on 14 October 1988 unconditionally accepted the price, and all the stated terms and conditions. A binding contract had therefore been concluded between the respondent as vendor and the appellant, who was unnamed, as the purchaser. After the conclusion of the contract, it was not open to the respondent, without proper justification, to repudiate or terminate the contract or to vary it by introducing a new material term on the disclosure of identity or non-vacant possession.

[4] The English Statute of Frauds has no application in West Malaysia. But even if that Statute applies to the present case, the requirements of the Statute have been complied with.

[5] The learned judge, in accepting the oral evidence of PW4 and consequently finding that the payment of RM1,000 was made on behalf of Ray Cheah, and not the appellant, had overlooked the letter of 4 October 1988.

[5a] The learned judge could not be right when making a finding that "during the period of the said letter, i.e. 13 September 1988 to 11 October 1988, the purchasers were initially Ray Cheah of IGB, and later Zodiac". By the statutory declaration made by IGB when it entered the private caveat against the said land, it is clear that IGB entered the scene only on 9 December 1988, well after 11 or 14 October 1988.

[6] The brief finding by the learned judge that Zodiac was the purchaser cannot be right in the light of the letters dated 4 October 1988 and 5 October 1988 by Appraisal to PW2, the letter dated 22 November 1988 from the appellant's solicitors, the letter dated 30 November 1988 from Zodiac's own solicitors, and the reply from the appellant's solicitors dated 2 December 1988. It is clear from these letters that the irresistable conclusion is that Zodiac was the proposed assignee or purchaser from the appellant, and not from the respondent.

[6a] The evidence also showed that Zodiac was to be the purchaser from the appellant in an on-sale transaction or back to back transaction. Considering the business of PW1 as an estate agent, there is nothing wrong in his conduct in trying to find the best buyer in an on-sale transaction.

[7] The present appeal involves several material contemporaneous letters and oral evidence as to whether the appellant is the purchaser of the said land. These contemporaneous letters, written before any dispute had arisen, must be given better crecedence than the oral evidence.

[7a] The learned judge had not taken a proper approach or given due consideration to the contemporaneous letters herein, namely the letters of 17 August 1988, 3 September 1988, 4 October 1988, 5 October 1988, 11 October 1988, 22 October 1988 and 30 November 1988. The inescapable inference which could be drawn from the contemporaneous documents and the conduct of the parties is that, the purchaser of the said land was the appellant, Anvest Corporation Sdn Bhd.

[Appeal allowed; High Court to make proper order for completion of the contract.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu berhajat untuk membeli sebidang hartanah di Kuala Lumpur dan pada 17 Ogos 1988 ia melantik sebuah syarikat penilai dan ejen hartanah ('Appraisal') untuk mencari hartanah tersebut. Appraisal berikutan itu berjumpa dengan responden, pemilik hartanah Lot 129, Seksyen 44, Bandar dan Daerah kuala Lumpur ('tanah tersebut'). Melalui surat bertarikh 13 September 1988, Appraisal memberitahu responden bahawa ia telah mendapatkan pembeli bagi tanah tersebut pada harga RM45 satu kaki persegi, ekoran mana responden membuat tawaran balik pada harga RM55 satu kaki persegi. Pada 3 Oktober 1988, berikutan penerimaan tawaran balik tersebut oleh perayu, Appraisal menulis kepada responden mengesahkan bahawa ia bersetuju untuk membeli tanah tersebut pada kadar harga RM55 satu kaki persegi dengan syarat, antara lain, bahawa pembelian tersebut adalah dengan milikan kosong. Pada 4 Oktober 1988, Appraisal sekali lagi menulis kepada responden untuk mendapatkan pengesahan tentang terma-terma penjualan yang termaktub dalam surat 3 Oktober 1988 nya itu, sekaligus menyerahkan kepada responden RM1,000 sebagai wang cengkeram. Responden memberikan pengesahan seperti yang diminta, tetapi mencadangkan supaya tempoh pelaksanaan bagi penjualan tersebut dipendekkan.

Pada 7 Oktober 1988, perayu mengesahkan penerimaannya terhadap terma-terma seperti yang disahkan oleh responden di atas. Dengan hal yang demikian, pada 11 Oktober 1988, Appraisal menulis kepada responden memberitahu mereka bahawa pembeli telah mengesahkan untuk membeli tanah tersebut tertakluk kepada terma dan syarat bahawa harganya adalah pada kadar RM55 satu kaki persegi, bahawa tanah tersebut adalah satu pegangan bebas, bahawa pembelian adalah dengan milikan kosong, bahawa 10% dari harga belian dibayar sewaktu perjanjian jual beli ditandatangani dan bakinya akan dibayar dalam tempoh enam bulan selepas perjanjian dimeterai. Pada 14 Oktober 1988 kesemua terma dan syarat-syarat ini diterima tanpa syarat oleh responden.

Tidak dinafikan bahawa urusan jual beli di atas dibuat oleh perayu dan responden melalui Appraisal, dan bahawa, pada semua waktu material, identiti perayu (selaku pembeli) tidak diketahui oleh responden. Fakta juga menunjukkan bahawa, berikutan penerimaan tanpa syarat responden di atas, perayu telah memeterai perjanjian dengan satu Zodiac, di mana perayu menyerahhak kepada Zodiac opsyen untuk membeli tanah tersebut.

Responden selepas itu cuba memasukkan satu terma baru kedalam perjanjian, iaitu ia akan menjual tanah tersebut tanpa milikan kosong. Apabila percubaan tersebut gagal, responden mengambil langkah untuk membatalkan penjualan yang dicadangkan itu, dengan menyatakan, sebagai alasan bagi tindakannya itu, keengganannya untuk berurusan dengan prinsipal yang tidak didedahkan. Hakim di bawah yang bijaksana mendapati bahawa perayu bukanlah pembeli tanah tersebut oleh kerana tidak wujud priviti kontrak pada bila-bila masa pun di antara perayu dan responden. Perayu merayu dan isu penting yang berbangkit ialah samada perayu, di sisi undang-undang, menjadi pembeli tanah tersebut pada 14 Oktober 1988 apabila responden membuat pengesahan menerima tanpa syarat semua terma dan syarat yang termaktub dalam surat Appraisal bertarikh 11 Oktober 1988 tersebut.

Diputuskan:
Oleh Mokhtar Sidin HMR

[1] Ianya jelas bahawa Appraisal dalam surat bertarikh 11 Oktober 1988 berkontrak sebagai ejen bagi pihak prinsipalnya, iaitu perayu yang ketika itu tidak dinamakan.

[2] Undang-undang berkaitan ejen dan prinsipal dan perhubungan mereka dengan pihak ketiga adalah jelas dan telah dikanunkan dalam ss. 183-186 Akta Kontrak 1950. Kaedah amnya ialah seseorang prinsipal adalah terikat dengan, dan berhak kepada faedah yang berbangkit dari kontrak yang dimeterai oleh ejen bagi pihaknya selagi kontrak itu termasuk dalam autoriti sebenar ejen tersebut. Ianya begitu samada ejen, sewaktu bertindak sedemikian, menamakan atau mendedahkan prinsipalnya ataupun hanya memberi gambaran bahawa beliau bertindak untuk seorang prinsipal tetapi tidak menamakannya.

[3] Responden, walaupun mengetahui bahawa prinsipal tidak dinamakan, telah pada 14 Oktober 1988 menerima tanpa syarat harga serta kesemua terma-terma dan syarat-syarat yang dinyatakan. Satu kontrak yang mengikat dengan itu telah dimeterai di antara responden sebagai penjual dan perayu, yang tidak dinamakan, sebagai pembeli. Setelah kontrak

dimeterai, ianya tidak terbuka bagi responden, tanpa justifikasi wajar, untuk menolak atau membatal kontrak tersebut, ataupun untuk mengubahnya dengan memasukkan kedalamnya suatu terma baru yang material berkenaan pendedahan identiti atau tanpa milikan kosong.

[4] Statute of Fraud Inggeris tidak terpakai di Malaysia Barat. Tetapi, jikapun ia terpakai kepada kes di sini, keperluan statut tersebut sudah dipatuhi sepenuhnya.

[5] Hakim yang bijaksana, dalam menerima keterangan lisan PW4 dan dengan itu merumuskan bahawa bayaran RM1,000 tersebut adalah dibuat bagi pihak Ray Cheah, dan bukannya bagi pihak perayu, telah terlupa mengambil kira surat bertarikh 4 Oktober 1988.

[5a] Hakim yang bijaksana tidak mungkin betul apabila membuat rumusan bahawa "dalam tempoh surat tersebut, iaitu antara 13 September 1988 hingga 11 Oktober 1988, pembeli-pembeli pada mulanya adalah Ray Cheah dari IGB, dan kemudiannya Zodiac". Berdasarkan akuan berkanun yang diikrarkan oleh IGB apabila ia memasukkan kaveat persendirian terhadap tanah tersebut, ianya jelas bahawa IGB hanya mula terlibat pada 9 Disember 1988, jauh selepas 11 atau 14 Oktober 1988.

[6] Hakim yang bijaksana tidak mungkin betul dengan rumusan ringkasnya bahawa Zodiac adalah pembeli tanah tersebut. Berdasarkan surat bertarikh 4 Oktober 1988 dan 5 Oktober 1988 dari Appraisal kepada PW2, surat bertarikh 22 November 1988 dari peguamcara perayu, surat bertarikh 30 November 1988 dari peguamcara Zodiac sendiri, dan jawapan dari peguamcara perayu bertarikh 2 disember 1988, ianya jelas bahawa satu-satunya konklusi yang boleh dibuat ialah bahawa Zodiac adalah pemegang serahanhak atau pembeli yang dicadangkan dari perayu, dan bukannya dari responden.

[6a] Keterangan juga menunjukkan bahawa Zodiac akan menjadi pembeli dari perayu melalui transaksi jualan atas jualan atau jualan belakang ke belakang. Mengambil kira perniagaan PW1 sebagai ejen hartanah, tiada apa-apa kesalahan dalam tingkahya untuk mencari pembeli terbaik dalam penjualan sedemikian.

[7] Rayuan semasa melibatkan beberapa surat kontemporari yang material serta keterangan lisan berhubung samada perayu merupakan pembeli tanah tersebut. Surat-surat kontemporari ini, yang ditulis sebelum mana-mana pertelingkahan berbangkit, harus diberi keutamaan berbanding dengan keterangan-keterangan lisan.

[7a] Hakim yang bijaksana tidak mengambil pendekatan yang betul atau tidak memberi pertimbangan yang sewajarnya kepada surat-surat kontemporari di sini, yakni surat-surat bertarikh 17 Ogos 1988, 4 Oktober 1988, 5 Oktober 1988, 11 Oktober 1988, 22 Oktober 1988 dan 30 November 1988. Konklusi muktamad yang boleh dibuat dari surat-surat kontemporari dan dari tingkahlaku pihak-pihak di sini ialah, bahawa pembeli tanah tersebut adalah perayu, Anvest Corporation Sdn Bhd.

[Rayuan dibenarkan; Mahkamah Tinggi akan membuat perintah yang sesuai bagi pelaksanaan kontrak.]

Cases referred to:
Basma v. Weekes [1950] AC 441 ***(foll)***
China Airlines Ltd v. Maltran Air Corp Sdn Bhd [1996] 3 CLJ 163 ***(refd)***
Davies v. Sweet [1962] 2 QB 300 ***(foll)***
Fung Ping Shan v. Tong Shun [1918] AC 403 ***(dist)***
MAA Holdings Sdn Bhd v. Ng Siew Wah [1986] 1 MLJ 170 ***(refd)***
Potter v. Duffield [1874] LR 18 Eq 4 ***(dist)***
Sivalingam Periasamy v. Periasamy [1996] 4 CLJ 545 ***(refd)***
Tan Sri Khoo Teck Puat v. Plenitude Holdings Sdn Bhd [1993] 2 CLJ 146 ***(refd)***
Wan Naimah v. Wan Mohamad Nawawi [1974] 1 MLJ 77 ***(refd)***

Other source referred to:
Bowstead on Agency, 15th edn, p 312
Chitty on Contracts, 1994, 27 edn, vol 2
Halsbury's Laws of English, 4th edn, vol 1

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S6-22-242-1989]

For the appellant - Wong Kim Fatt (Apparao Apana & Gan Huey Piin with him); M/s KC Yap, Kamaludin & Partners
For the respondent - Dr Cyrus Das (Harcharan Singh with him); Harcharan, Hashimah & Co

Reported by Rusnah Abd Aziz

JUDGMENT

Mokhtar Sidin JCA:

This is an appeal against the decision of the learned trial judge dismissing the claim of the appellant for specific performance of a contract contended by the appellant to be concluded and binding in the form of a letter dated 11 October 1988 written by Appraisal (Malaysia) Sdn. Bhd. (hereby referred to as "Appraisal') to the respondent (Appeal Record, p. 196) relating to the sale and purchase of a piece of land known as Lot 129, Section 44, Town and District of Kuala Lumpur ('the said land'), measuring in area 100,934 sq.

ft., at the price of RM55 per sq. ft. The appellant claimed that it is the purchaser of the said land registered in the name of the respondent as proprietor. The learned judge found as a fact that the appellant was not the purchaser of the said land and that there was no privity of contract at any time between the appellant and the respondent. He accordingly dismissed the appellant's claim with costs, and hence the appellant brought this appeal. We unanimously allowed the appeal on 9 December 1997. We now give our reasons for doing so.

The Issue

The principal issue for determination is whether the appellant was the purchaser of the said land on 14 October 1988, when the respondent unconditionally confirmed acceptance of the terms and conditions set out in Appraisal's letter of 11 October 1988 which will be reproduced in the course of this judgment.

Facts

In order to understand the case fully, it is necessary to narrate the material facts and events. The following facts were agreed between the parties. The appellant instructed Appraisal, a company of valuers and estate agents, to look for a piece of land to be purchased by the appellant. The appellant was dealing directly with Mr. Tan Loy Fatt (PW1), the managing director of Appraisal, in respect of the purchase. The respondent also utilised the services of Appraisal to secure a purchaser for the said land. The respondent dealt with Mr. Foo Fang Lim (PW4) of Appraisal in regard to its intended sale of the said land. Neither the appellant nor the respondent knew the identity of each other at first. PW1 as the managing director of Appraisal was in communication with PW4, then a registered estate agent and an employee of Appraisal.

In determining whether the appellant was the purchaser of the said land, the material starting point is 17 August 1988 when by a letter of that date (AR 191) the appellant instructed Appraisal to find a property of about 2 to 4½ acres in prime location in Kuala Lumpur, promising a 2% agency fee. This was also stated in the oral evidence of Miss Kheoh And Yeng (PW2) (see AR 54, 78-79). It is material to consider the three letters written by Appraisal to the respondent as well as other material documents in the light of the oral evidence given at the trial. These three letters are dated 13 September 1988 (AR 193), 4 October 1988 (AR 194) and 11 October 1988 (AR 196). In the letter of 13 September 1988, written by PW4 on behalf of Appraisal and expressed to be subject to contract, Appraisal confirmed with the respondent that Appraisal had found a purchaser for the said land at the price of RM45

per sq. ft. The respondent by its managing director made a counter offer on 30 September 1988 of RM55 per sq. ft. on the said land. On 3 October 1988, the appellant wrote (AR 241) to Appraisal instructing it to keep the identity of the appellant strictly confidential regarding the purchase of the said land. It is pertinent to quote the letter which is as follows:

3/10/1988

Appraisal (Malaysia) Sdn Bhd

Attention: Mr. L.F. Tan

... Lot 129 ...

Reference to our various conversation to the above, please be informed that we are agreeable to purchase the property on the following terms and conditions:

1. The price of the land is $55.00 per sq. ft.
2. That the property is of freehold title.
3. That the purchase is together with vacant possession of the land.
4. Payment of 10% of the purchase price will be made upon signing of a formal sales and purchase agreement.
5. The balance of 90% of purchase price will be paid 9 (nine) months after the sale and purchase agreement.

Kindly keep our identity strictly confidential for the time being.

The instruction on the confidentiality of the appellant's identity was also confirmed by the oral evidence of PW1 at AR 61 and AR 71, and PW2 at AR 79. In Appraisal's letter dated 4 October 1988 (AR 194 or 244), written by PW4 to the respondent and expressed to be subject to contract, Appraisal sought confirmation from the respondent on, *inter alia*, the sale of the said land at RM55 per sq. ft., with vacant possession, and that under item (5) above the balance of 90% of the purchase price was to be paid nine months after the execution of the sale and purchase agreement. Appraisal also sent a cheque for RM1,000 as earnest money and the respondent confirmed acceptance at the foot of the letter at AR 195 but amended and shortened the completion period from "nine months" to "six months" for payment of the balance of the purchase price under item (5).

Appraisal took the precaution of sending a copy of its letter of 4 October 1988 (AR 194 or 244) to its principal the appellant for confirmation under cover of its letter dated 5 October 1988 (AR 243) written by PW1 on behalf of Appraisal, and PW2 as director of the appellant accepted it on 7 October 1988 in accordance with the terms stated in Appraisal's letter of 4 October 1988 where at the foot of the letter it was written as follows:

> October 5, 1988
>
> Miss Kheoh And Yeng.
>
> Purchase of Lot 129 ...
>
> We attach herewith a copy of our letter dated October 4, 1988 containing the terms as agreed upon by the landowner, M/s Wong Siew Choong Sdn. Bhd.
>
> Please note the landowner's amendment on item (5).
>
> Kindly confirm your acceptance by signing and returning the duplicate copies of our letter of October 4 and this letter.
>
> Yours faithfully
>
> APPRAISAL (MALAYSIA) SDN. BHD.
>
> Sd.
> L F Tan
> Managing Director
>
> TFL/ml
>
> ANVEST CORP SDN. BHD.
>
> ACCEPTANCE
>
> Sd. [Kheoh]
> Authorised Signature
>
> Authorised Signature
>
> DIRECTOR
>
> Name & Designation
>
> Date : 7th Oct 1988

This acceptance was also confirmed by the oral evidence of PW1 at AR 56 and PW2 at AR 80.

The crucial letter is the third letter which is dated 11 October 1988 (AR 196), written by PW4 on behalf of Appraisal to the respondent as a follow-up of PW2's above confirmation on Appraisal's letter dated 5 October 1988. The terms and conditions stated in the letter of 11 October 1988 (AR 196) were accepted and confirmed unconditionally on 11 October 1988 on behalf of the respondent by Mr. Wong Kok Suan, its managing director. Again this letter merits full reproduction which is as follows:

APPRAISAL (MALAYSIA) SDN. BHD.

CHARTERED SURVEYORS & REGISTERED VALUERS
Lot 207, 20th Floor, Menara Maybank, No. 100, Jalan
Tun Perak, 50050 Kuala Lumpur. Telephone: 2322022

PRIVATE & CONFIDENTIAL

October 11, 1988

M/s Wong Siew Choong Sdn. Bhd.
c/o No. 3 Jalan Yap Kwan Seng
50450 Kuala Lumpur.

Attn: Mr. Wong Kok Suan

Dear Sirs,

Proposed Sale of Property held under Lot No. 129, Section 44,
Town and District of Kuala Lumpur (100,934 sq. ft.)

We are pleased to inform you that the purchaser has confirmed to purchase the abovementioned land.

The terms and conditions, as agreed, are as follows:

(1) the price is at $55.00 per sq. ft.;

(2) the property has a freehold title;

(3) you are able to give vacant possession of the property;

(4) 10% (ten percentum) of the price will be paid on signing of the Sale and Purchase Agreement; and

(5) the balance 90% (ninety percentum) to be paid 6 (six) months after the signing of the Sale and Purchase Agreement.

The purchaser's solicitors are

Mr. Choong Pee Choy of
M/s Choong & Co.
Room 805/807, 8th Floor Lee Wah Bank Building
Medan Pasar, 50050 Kuala Lumpur
Tel: 2384682/2320858

Kindly confirm that the abovementioned terms and conditions by signing and returning the duplicate of this letter.

Yours faithfully APPRAISAL (M) SDN. BHD.	The abovementioned terms and conditions are confirmed herewith.
Sd	
FOO FANG LIM Registered Estate Agent	WONG SlEW CHOONG SDN. BHD. Authorised Signature
	Sd
	Managing Director Name: Date: 14.10.88

By a letter dated 18 October 1988 (AR 192) from M/s Michael Chen & Lee, solicitors for the respondent, addressed to M/s Choong & Co., the respondent amended and introduced a new term, ie, the sale is without vacant possession. The reply to that letter from M/s Choong & Co. was dated 20 October whereby it was stated that they had no instructions to prepare the draft of the sale and purchase agreement. It went on to say that the draft was to be prepared by M/s Raja Eleena Siew Ang & Tan. By a letter dated 21 October 1988 (AR 201), M/s Siew Ang & Tan notified M/s Michael Chen & Lee that they were acting "for the prospective purchaser" without naming the purchaser. The reply from M/s Michael Chen & Lee was dated 25 October 1988 (AR 202) where it was stated that it would only deal with a disclosed principal and purported to terminate and/or revoke the proposed sale of the said land. Zodiac Development Sdn. Bhd. came into the picture in a letter dated 29 October 1988 from M/s Siew Any & Tan to Michael Chen & Lee where the latter was informed by the former that the former was acting for Zodiac as the prospective purchaser. By a letter dated 22 November 1988 (AR 215) M/s Yusuf Lee Pathma & Marbeck wrote to M/s Raja Eleena Siew Any & Tan, stating that they (M/s Yusuf Lee) never acted for Zodiac but for "Anvest Corporation Sdn. Bhd., the principal on the purchase of the said land". In that letter M/s Yusuf Lee Pathma & Marbeck mentioned an assignment to Zodiac and stated as follows:

> We refer to your agreement to assign and are instructed that our clients are quite agreeable to the terms thereof provided that your clients agree to grant an appropriate Power of Attorney to our clients in the form and substance attached hereto and make to our clients equivalent to the first ten per centum (10%) of the purchase price of the said Land within **SEVEN (7) DAYS** from the date hereof for onward transmission to the Seller's Solicitors.

The reply to that letter from M/s Siew Ang & Tan dated 30 November 1988 (AR 217) is significant to note that M/s Siew Ang & Tan accepted that Zodiac was purchasing the land from the appellant. The contents, *inter alia,* of that letter are as follows:

> 30th November 1988
>
> M/s Yusuf Lee Pathma & Marbeck
>
> Re: ... Lot 129 ...
>
> We write to put on record the following events:
>
> a) **We are acting for M/s Zodiac Development Sdn. Bhd;**
>
> b) Our clients were approached by your clients wherein our clients were informed by your clients that they have been granted an option to purchase the above property. **Our clients were further informed that your clients are agreeable to assign the option to purchase to our clients** subject to the payment of a sum of money to your clients as a consideration for the assignment. (Emphasis added)

That letter ended as follows:

> Based on the above events we have now been instructed to inform that our clients are still interested in the property and are willing to enter into fresh negotiations with your clients for the purchase of the same from your clients only after your clients have purchased the above property from the Vendor. (Emphasis added)

By a letter dated 2 December 1988 (AR 219) M/s Yusuf Lee Pathma & Marbeck informed M/s Michael Chen & Lee of the assignment. The contents, *inter alia,* of that letter are as follows:

2nd December 1988

Messrs. Michael Chen & Lee
Advocates & Solicitors
8th Floor, Bangunan Bangkok Bank **BY HAND**
105, Jalan Bandar
50000 Kuala Lumpur

Dear Sirs,

Re: Grant No. 6853 Lot 129, Section 44, Town and District of Kuala Lumpur

We act for Anvest Corporation Sdn. Bhd., the Purchaser of the land above-captioned and are instructed that you are acting for the Seller thereof.

We are further instructed that **Zodiac Development Sdn. Bhd. was our clients' proposed assignee** of our clients' interests contained in the written agreement constituted by several letters between your clients and M/s Appraisal (Malaysia) Sdn. Bhd. and between our clients and M/s Appraisal (Malaysia) Sdn. Bhd.

Kindly be informed that our **clients' said assignee** has agreed to cease communicating with your clients or you as Solicitors and our clients will now proceed to pursue with the Agreement aforesaid strictly upon the terms agreed therein. (Emphasis added)

Mr. Wong Kim Fatt, learned counsel for the appellant, submitted that the terms and conditions of the sale and purchase of the said land as stated in Appraisal's letter of 11 October 1988 had been unconditionally accepted by the respondent on 14 October 1988.) He submitted that all the time the respondent knew that there was a principal and that Appraisal was contracting on behalf of the principal whose identity was not required by the respondent to be disclosed when it accepted the terms and conditions. In the circumstances, there was a concluded and binding contract between the appellant and the respondent. Mr. Wong referred us to the several contemporaneous letters, oral evidence and the authorities which we will revert to later on. He submitted that the learned judge had erred in law and fact and had failed to consider properly the letter dated 17 August 1988 appointing Appraisal as agent, the letter of 5 October 1988 (AR 243) confirmed by PW2 on 7 October 1988, the oral evidence of PW1, PW2 and PW3 (Lee Lim Huat) relating to the secrecy of the appellant's identity and the on-sale of the said land to Zodiac as the proposed assignee of the appellant. He further submitted that the appellant is the purchaser of the said land, and that no other party had come forward to claim to be the purchaser.

On the other hand, Dr. Cyrus Das, learned counsel for the respondent, submitted that as on 14 October 1988, the appellant was not the purchaser of the said land. He argued that the appellant came into the picture after the respondent had terminated the proposed sale. He submitted that we should not disturb the findings of fact by the learned trial judge that the appellant was not the purchaser of the said land referred to in the three letters stated above. The learned judge had held that there was no privity of contract between the appellant and the respondent. Dr. Das relied heavily on the oral evidence of PW4, a former employee of Appraisal. Learned counsel contended that Zodiac was the purchaser in respect of the letter of 11 October 1988. He submitted that PW1 had been hawking the said land and had breached the Valuers, Appraisers and Estate Agents Rules of 1986 prohibiting a firm of estate agents from acting for both vendor and purchaser except with their knowledge and consent.

The learned judge in his judgment (at p. 4) said, "In law, the identity of vendor and purchaser is pivotal as to whether there exists any enforceable contract. It is a question of privity of contract. At common law, the mere use of the term 'vendor' or 'purchaser' on a document purporting to evidence a contract is insufficient to make it legally binding." He then cited the sole authority in his judgment, ie, the old English case of *Potter v. Duffield* [1874] LR 18 Eq. 4, a decision of Jessel M.R. involving the English Statute of Frauds 1677, which has no application to the present case. However, with the greatest respect to the learned judge, we find that he did not discuss the law of agency and also he did not decide if there was a concluded and binding contract arising out of the unconditional acceptance by the respondent of the terms and conditions stated in the letter of 11 October 1988. We find it relevant to discuss briefly the law in respect of these before determining the question whether the appellant was the purchaser of the said land.

Agents And Principals

The law relating to agents and principals and their relations to third parties is well settled and is codified under ss. 183 to 186 of our Contracts Act 1950. In Vol. 1, *Halsbury's Laws of English* (4th Edn), at para. 854 there appears the following passage:

> Identity of principal not disclosed. Where an agent in making a contract discloses the existence, but not the name, of a principal on whose behalf he is acting, he is not made liable by the mere fact of not disclosing the name ...

The general rule is stated in para. 31-53 of *Chitty on Contracts* Vol. 2 (27th Edn (1994)), which is as follows:

> The general rule is that a principal is bound by, and entitled to the benefit of the contract of his agent made on his behalf within the scope of such agent's actual authority. This is so whether the agent at the time of acting named or identified his principal ("named principal") or merely indicated that he was acting for a principal but did not identify him ("unnamed principal") ...

In *Bowstead on Agency* (15th Edn) at p. 312 there is the following general statement:

> (1) An undisclosed principal may sue or be sued on any contract made on his behalf, or in respect of money paid or received on his behalf by his agent acting within the scope of his actually authority.

George, J (as he then was) in the case of *MAA Holdings Sdn. Bhd. v. Ng Siew Wah* [1986] 1 MLJ 170 at p. 171 said:

> It is not uncommon that in mercantile transactions one party acts as agent for an undisclosed principal. The law recognises that and the rights of the parties to a contract made by an agent of an undisclosed principal have been codified in ss. 183 to 186 of the Contracts Act. Section 184 goes to the extent of providing that the undisclosed principal may require the performance of the contract even though the other party to the contract neither knew or had reason to suspect that the person he had dealt with was in fact an agent.

In *Contract Cases and Materials (Beale, Bishop and Furmston, Butterworths 1990)* at p. 800 stated as follows:

> There is nothing to stop an agent contracting explicity on someone else's behalf without naming his principal. The third party may not be worried about who the principal is and if it does concern him he can of course refuse to contract without the identity of the principal being revealed.

Whether There Is A Concluded And Binding Contract?

We now return to the issue in the present appeal whether there is a concluded and binding contract. First we return to the letter dated 11 October 1988. The purchaser in the first paragraph appears to us to be the same purchaser in the previous two letters dated 4 October 1988 and 13 September 1988. It is clear to that Appraisal in the letter of 11 October 1988 was contracting as an agent on behalf of its principal, ie, the appellant who was unnamed then. At that time there was no requirement by the respondent to reveal the name and the identity of the principal when responding to those letters. Thus in the letter dated 11 October 1988 reproduced above, the subject matter was the said land,

the vendor was the respondent, the purchaser was the unnamed principal of Appraisal. The respondent despite knowing that the principal was unnamed had on 14 October 1988 unconditionally accepted the price, and all the terms and conditions stated therein, thereby in our view concluding a binding contract between the respondent as vendor and the appellant, who was the unnamed principal as the purchaser. We are of the view that after the conclusion of the contract, it was not open to the respondent without proper justification to repudiate or terminate the contract or to vary it by introducing a new material term on the disclosure of identity, or non-vacant possession in trying to renege upon the agreement. Appraisal's solicitors' letter dated 14 November 1988 (AR 212) to the respondent's solicitors had maintained that "at all times there was and is a firm agreement by your clients to sell the land above-captioned as further evidenced by your clients' acceptance of payment". Appraisal's solicitors also sent back the cheque for RM1,000 which was returned by the respondent's solicitors.

In our view it is clear from the authorities that the English Statute of Frauds has no application in West Malaysia (see *Wan Naimah v. Wan Mohamad Nawawi* [1974] 1 MLJ 77). Even if that Statute applies to the present case, the requirements of the Statute have been complied with. This can be seen from the case of *Basma v. Weekes* [1950] AC 441. In that case the purchaser (Wright) named in the agreement was a solicitor and it was proved by oral evidence that he was, to the knowledge of the respondents (vendors), acting in the matter as agent for the appellant (Basma), but the agreement, as in the present appeal before us, did not name the appellant as purchaser. In delivering the judgment of the Judicial Committee, Lord Reid said at p. 454:

> Their Lordships are satisfied that in the present case the terms of the agreement of 29 November are such that Wright was contractually bound, and therefore the agreement satisfies the Statute of Frauds. So Wright could have sued on the agreement, and if he could sue, so can his principal, the appellant.

The decision of *Basma v. Weekes* was followed by the English Court of Appeal in *Davies v. Sweet* [1962] 2 QB 300.

As PW1 was under strict instruction by PW2 to keep the identity of the appellant confidential, it is not surprising that PW4 did not initially hear of the appellant from PW1. The learned judge was of the view that during the period 13 September 1988 to 11 October 1988 the purchasers were initially Ray Cheah of IGB and later Zodiac. The learned judge had relied virtually or substantially on the oral evidence of PW4. The learned judge at p. 8 of his judgment said:

Mr. Foo goes on to say that when the letter (exh. P1 p. 26) dated 13 September 1988, was written, setting out the initial terms of sale, "the purchaser" referred to there was Ray Cheah of IGB. Mr. Foo then says that a sum of $1,000, a sort of booking fee, was paid to the defendant on behalf of Ray Cheah. Ray Cheah changed his mind about the purchase. Then Zodiac came into the picture. According to Mr. Foo, Zodiac was brought in by Mr. Tan (PW1).

Here PW4 clearly cannot be right when he said in oral evidence that the sum of RM1,000 was paid to the respondent on behalf of Ray Cheah, for his oral evidence is contradicted by the contemporaneous letter dated 4 October 1988 (AR 242) written by PW1 for Appraisal to PW2 of the appellant which is as follows:

October 4, 1988

Miss Kheoh And Yeng.

Dear Madam,

Purchase of Lot 129, Section 44,
Town and District of Kuala Lumpur
(100,934 sq ft approximately)

We attach herewith a copy of our letter dated October 4, 1988 (addressed to the landowner) which is self-explanatory, for your attention.

As instructed by you, we have forwarded your payment of $1,000 to the landowner and did not reveal the identity of the purchaser.

We are of the view that the learned judge had overlooked this important letter. The inaccurate recollection of PW4, who left the employment of Appraisal in 1990, was understandable as he was testifying in 1995.

We note from the Appeal Record that the appellant had entered a private caveat against the said land (AR 246 to 249) on or about 22 November 1988. Paragraph 2 of the supporting statutory declaration dated 19 November 1988 of Miss Kheoh (PW2) reads as follows:

2. That by a Purchase Agreement on or about the **14th day of October 1988** made with WONG SIEW CHOONG LIMITED (hereinafter called "the Vendor"), we agreed to purchase and the Vendor agreed to sell the piece of land held under Grant 6853 Lot 129 Section 44 District of Wilayah Persekutuan for the consideration and upon the terms and conditions contained in the said Purchase Agreement. (Emphasis added)

Subsequently on or about 12 December 1988 (AR 220 to 223) IGB Corporation Bhd. also entered a private caveat against the said land. It is clear to us that in para. 2 of the supporting declaration it states that IGB Corporation Bhd. agreed to buy the said land on **9 December 1988** which was later than the date of the concluded contract between Appraisal and the respondent. This appears to escape the notice of the learned judge. As such he could not be right when he stated his finding that "during the period of the said letter, ie, 13 September 1988 to 11 October 1988, the 'purchasers' were initially Ray Cheah of IGB, and later Zodiac." By this declaration, IGB entered the scene only on 9 December 1988, well after 11 or 14 October 1988. For clarity we find it necessary to reproduce paras. 1 and 2 of the statutory declaration dated 6 December 1988 of Goh Nan Kioh (AR 223) as follows:

> 1. I am A DIRECTOR OF IGB Corporation Berhad.
>
> 2. By an agreement in writing dated the **9th day of December 1988** and made between ourselves and WONG SIEW CHOONG SDN. BHD. (hereinafter called "the Vendor") we agreed to buy and the vendor agreed to sell that piece of land held under Geran 6853 for Lot No. 129, Section 44, in the Town of Kuala Lumpur for the consideration and upon the terms therein contained.

According to the oral evidence of PW4, Zodiac was the purchaser in the letter of 11 October 1988. The brief finding by the learned judge that Zodiac was the purchaser cannot be right in the light of the letters dated 4 October 1988 (AR 242) and 5 October 1988 (AR 243) by Appraisal to PW2, the letter dated 22 November 1988 from the appellant's solicitors, the letter dated 30 November 1988 from Zodiac's own solicitors (which was referred earlier), and the reply dated 2 December 1988 from the appellant's solicitors. It is clear that from these letters, we are of the opinion that the irresistible conclusion is that Zodiac was the proposed assignee or purchaser from the appellant, and not from the respondent. It appears to us that in the mind of PW1 there was no other purchaser except the appellant. He was dealing with the appellant as purchaser at all material times. Nobody from Zodiac came forward to claim to be the purchaser. This is unlike the case of *Fung Ping Shan v. Tong Shun* [1918] AC 403, in which the uncle and the nephew had names which spelt the same in English as Tong Shun but which differed when written in Chinese characters. In that case it is to be noted that the uncle and the nephew each claimed that he was the person named as the purchaser in the indenture dated 17 September 1909. In the present appeal before us, the evidence of PW1, PW2 and PW3 further shows that Zodiac was to be the purchaser from the appellant in an on-sale transaction or back to back transaction. Considering the business of PW1 as an estate agent, we do not think there is anything wrong in his conduct in trying to find the best buyer in an on-sale transaction.

There appears to be some initial confusion on which solicitors were acting for which parties, but in our opinion the confusion was of no material significance whatsoever and does not affect the validity of the concluded contract.

During the trial the name of another company surfaced and that is the name of Gambang Development Sdn. Bhd. which appears to be PW2's RM2 shell company. We are of the opinion that nothing significant came out of it to merit our consideration.

We are fully aware that we, sitting as an appellate court, should be slow or reluctant to interfere with the findings of fact by the learned trial judge, unless those findings cannot be sustained and supported by the evidence. In *Tan Sri Khoo Teck Puat v. Plenitude Holdings Sdn. Bhd.* [1993] 1 MLJ 113, the Supreme Court then for reasons stated therein refused to interfere with the findings of fact by the trial judge. However, in *Sivalingam a/l Periasamy v. Periasamy* [1995] 3 MLJ 395, the Court of Appeal interfered with the findings of fact by the trial judge as he had not adopted the correct approach to the evaluation of the evidence. In a more recent case, the Federal Court in China *Airlines Ltd. v. Maltran Air Corp Sdn. Bhd.* [1996] 2 MLJ 517 also interfered with the findings of fact by the trial judge. In delivering the judgment of the Federal Court, Mohamad Dzaiddin FCJ at p. 531 said:

> In the light of the above matters, in our view, the inescapable inference which could be drawn from the contemporaneous documents and the conduct of the parties gathered from the letters referred to above was that there was no question of the agent being entitled to the incentive bonus both as a PSA and a GSA. In arriving at our conclusions, we have no doubt differed from the learned judge. However, since the credibility of the agent's witnesses is not the main issue, we are justified in coming to a different conclusion because upon a review of the evidence as a whole, we find the learned judge had misdirected herself in failing to give due considerations to the contemporaneous documents in assessing the probabilities of the case. Had she done so, the balance would tilt in favour of the appellant, China Airlines.

The appeal before us involves several material contemporaneous letters and oral evidence as to whether the appellant is the purchaser of the said land. We are of the view that those contemporaneous letters written before any dispute had arisen must be given better credence than the oral evidence, unless the totality of the evidence clearly shows otherwise. We are satisfied that the learned judge had not taken a proper approach or given due consideration in evaluating the contemporaneous letters referred to above, ie, the letters of 17 August 1988, 3 September 1988, 4 October 1988 (AR 196 and 242), 5 October 1988, 11 October 1988, 22 November 1988, 30 November 1988

(by Zodiac's own solicitors at AR 217) in the light of the totality of the evidence and also taking into account the fact that Mr. Wong Kok Suan, the managing director of the respondent, was not called to give evidence. We are of the view that the learned judge had not given due consideration to those letters. We are satisfied that the irresistible conclusion, or, to use the words of Dzaiddin FCJ quoted above, "the inescapable inference which could be drawn from the contemporaneous documents and the conduct of the parties", is that the purchaser of the said land was the appellant, Anvest Corporation Sdn. Bhd.

Breach Of The Rules

There is one other point raised by Dr. Das before us and in the court below, ie, PW1 had breached the valuers, Appraisers and Estate Agents Rules 1986 which in our view does not affect the conclusion of whether there is a binding contract or not. The only witness called by the respondent was one Miss Mahaletchumi, the registrar of the Board of Valuers, Appraisers and Estate Agents. She gave evidence as to the Rules of Board. She admitted that she had no personal knowledge of the transactions between the parties. As such she would not be able to know whether PW1 had actually breached the Rules. Even assuming that there was a breach being committed by PW1 he would be subjected to a disciplinary action by the Board but not to affect the transaction in this appeal. We are not sitting here to inquire into the complaints against PW1 but to decide on the transaction between the appellant represented by PW1 and the respondent.

Conclusion

For the reasons we have stated, we allowed the appeal of the appellant with costs here and below, and set aside the order of the learned judge. The deposit is to be refunded to the appellant. We directed that this case be remitted to the High Court regarding the proper order to be made for the completion of the contract between the appellant (Anvest Corporation Sdn. Bhd.) and the respondent (Wong Siew Choong Sdn. Bhd.) as embodied in the letter dated 11 October 1988 (AR 196) written by Appraisal to the respondent and confirmed by the respondent.